No. 12023

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

HONOLULU PLANTATION COMPANY,
Appellee,

and

HONOLULU PLANTATION COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR HONOLULU PLANTATION COMPANY, APPELLANT

On Appeal from the United States District Court For the District of Hawaii

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QUESTIONS INVOLVED

1. Does the Honolulu Plantation Company have such a property interest in the land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said Company as to entitle the latter to just compensation by way of severance damages under the Fifth Amendment of the Constitution of the United States?

2. Is the Honolulu Plantation Company entitled to just compensation in the amount of $595,010 for severance damages suffered by it through the taking of its property interest in 595.01 acres of cane land held by it under those certain agreements executed by and between the Trustees of the Damon Estate and said Company?

SUMMARY OF ARGUMENT

1. Where real property is condemned by the sovereign, a person other than the owner of the fee is entitled to compensation if he possesses an "interest" or "estate" in the land. By virtue of those certain agreements executed by and between the Honolulu Plantation Company and the Trustees of the Damon Estate, the Honolulu Plantation Company held a lease, or in the alternative, an agreement to lease in connection with the Damon lands and thus owned such a property interest in said lands as to entitle it to just compensation.

2. Where a part of a tract of land is taken for public use, the just compensation to which the owner of an interest therein is entitled includes the damages to the remainder of the tract resulting from the taking, in addition to the value of the land taken. As a result of the takings in these proceedings, the physical properties of the Honolulu Plantation Company remaining after the takings were depreciated in value because of the severance of the lands taken from the properties operated as a unit by the Plantation. The difference between the market value of all of the real properties of the Company held before the takings and forming the integrated enterprise owned and conducted by the Company and the market value of the same property remaining after the takings is the amount the Company suffered in damages by reason of the severance.

ARGUMENT

I.

THE HONOLULU PLANTATION COMPANY HAD SUCH A PROPERTY INTEREST IN THE LAND HELD BY IT UNDER THE DAMON TITLE AS TO ENTITLE IT TO JUST COMPENSATION BY WAY OF SEVERANCE DAMAGES UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

1. BY VIRTUE OF CERTAIN CORRESPONDENCE BETWEEN THE HONOLULU PLANTATION COMPANY AND THE TRUSTEES OF THE DAMON ESTATE, THE COMPANY HELD A LEASE ON THE SO-CALLED DAMON LANDS.

In its answering brief, the Government concedes (p. 10) that it is the intent of the parties which determines whether a particular instrument or series of instruments is a lease. However, the Government quoting from *Thompson on Real Property* (p. 10 brief) apparently contends that an agreement is a lease only if it "leaves nothing to be done and gives the lessee an immediate right of possession." Further, it is said (p. 10) that if the parties indicate an intention to execute a formal lease at a later date the agreement is not a completed lease. Then, the Government, in reliance upon these general propositions, argues that the correspondence referred to above does not constitute a lease. This theory is based entirely on the meaning of certain language in the correspondence which, it is said, indicates that the parties did not intend a present demise but rather an agreement to lease in the future. In the words contained in the brief, "Thus, there were no words of present demise; on the contrary, both parties spoke of the lease in future terms, an execution of a formal lease was expressly contemplated."

The fallacy in the Government's argument lies in the misapplication of the basic legal principles upon which their theory rests. The quotation from Thompson on Real Property, supra, may be a correct statement of the law under certain circumstances but it cannot, as the Government seems to suggest, be applied to all situations. This is clearly demonstrated by the following quotation which appears in Thompson on Real Property (Vol. 3, p. 293, Sec. 1215) in the same paragraph from which the Government's quote is taken.

> "However, where there were apt words of present demise, and the tenant went into possession and occupancy thereunder, such instrument has been construed as a present demise rather than as an agreement for a lease, *notwithstanding it contained a covenant for the execution of a more perfect and formal lease.*" (italics added.)

The quotation from the case of *Dan Cohen Realty Company v. National Savings and Trust Company,* 125 F. 2d. 288, 289, 1942, to the effect that "If the contracting parties manifest an intention of executing, subsequently, a formal lease with covenants, the agreement to lease is not a completed lease" (p. 10) is entitled to but little weight. The statement is made as a dictum in a case in which the question was one of venue of the Circuit Court. The only relief asked was that the defendants be compelled to execute the lease, and the holding of the court was that this was an action in personam, and thus not within the jurisdiction of the court of the district in which the property was situated. The question as to whether or not there was a lease was not before the court and was not essential to the determination of the issues in that case. In addition, the above quoted paragraph from Thompson on Real Property indicates that even though the parties manifest an intention to execute

subsequently a formal lease, an agreement, if it contains apt words of present demise, may be construed as a lease.

In the instant case, the correspondence between the parties indicates that the parties intended a present demise. The property was described with sufficient definiteness, the term was designated and the rental specified. After the expiration of the 1927 lease, the Honolulu Plantation Company remained in possession of the premises under what it considered to be a valid lease. On January 1, 1944, the effective date of the new lease, the Company was billed by the lessors at a different and higher rental than was provided for in the 1927 lease. (R. p. 1202.) Subsequently, the Company paid the rentals at the newer and higher rate. The Company, in reliance on the validity of the lease, had made substantial expenditures on the lands (R. p. 1202). Mr. P. E. Spalding, attorney in fact for Honolulu Plantation Company and president of C. Brewer & Company, who was instrumental in the negotiation of the new lease, testified that he believed that the Honolulu Plantation Company had a lease on the Damon lands in question by virtue of the exchange of letters referred to above. (R. p. 1113 et seq.). This was never refuted by the lessors, although the latter might have been called by the Government to testify concerning their view of the transaction. In view of these facts, it is submitted that it was the intention of the parties that the agreement was to constitute a lease of the premises.

2. IN THE ALTERNATIVE, BY VIRTUE OF CERTAIN CORRESPONDENCE BETWEEN THE HONOLULU PLANTATION COMPANY AND THE TRUSTEES OF THE DAMON ESTATE, AND THE ACTS AND EXPENDITURES OF MONIES BY HONOLULU PLANTATION COMPANY IN RELIANCE THEREON, THE COMPANY HELD AN AGREEMENT TO LEASE ON THE SO-CALLED DAMON LANDS.

It is the position of the appellant that even if it be assumed that the letters of October 18, 1940 and October 21, 1940 (Ex. 9-K, R. p. 1513) do not constitute a lease, they do constitute a contract to lease and that, accordingly, the Honolulu Plantation Company is entitled to recover just compensation for severance damages suffered by the Company by virtue of the taking of its property interest in 595.01 acres of cane land held by it under said contract.

The appellee contends that the correspondence between the appellant's agent and the trustees of the Damon Estate was mere negotiation and not a contract. The Court below found as a fact that there was a contract to lease. (R. p. 497):

> "The known facts are that:
>
> "2. Anticipating the expiration of the then existing lease, on October 18, 1940, the trustees of the Damon Estate offered in writing (Exhibit 9-K) to enter into a new lease with the Company upon terms specified for a period of ten years from January 1, 1944. The offer disclosed that due to anticipated condemnation proceedings not all of the lands involved might be available for lease.
>
> "3. By letter dated October 21, 1940, the Company accepted the Estate's offer. (Exhibit 9-K).
>
> "4. By the terms of this contract both parties had expressly in mind the execution of a formal lease. This

was never done, nor did the Company ever bring suit for specific performance."

Again on page 499 of the record the Court said: "Whether here there is a lease or an executory contract for a lease depends essentially upon the intention of the parties, as gathered from the terms of their October 1940 agreement. If it is a lease, the Company acquired an estate in the lands for 10 years from January 1, 1944. If it is not, it acquired simply an executory right to compel the Damon Trustees to convey to it such an estate, for breach of which contract the Company could recover damages or sue for specific performance. (citing authorities)."

Again, on page 502: "At best, having remained in possession after December 31, 1943, and thereafter having paid the yearly rent called for by the October 1940 contract, the Company had a year to year tenancy, with a right to sue for specific performance."

In its argument the appellee relies on the case of *Elkhorn-Hazard Coal Co. vs. Kentucky River Coal Corporation,* 20 F. 2d. 67 (CCA 6, 1927), stating in its brief (page 11): "The material facts of that case were indistinguishable from those at bar." This contention is unsound. The following material facts were distinguishable from those in the case at bar: (1) The Elkhorn-Hazard case involved a mining lease. This type of lease has long been distinguished by the courts from an ordinary lease of real property. 36 Am. Jur. 309. (2) The Elkhorn-Hazard case was a suit in trespass. The purported lessee had not been in possession of the mine and was being sued in trespass for going into possession without a lease. (3) The question involved in the Elkhorn-Hazard case was whether the mailing of the letter of acceptance constituted an acceptance where it was not received by the offeror. *Elkhorn-Hazard Coal Co. vs. Kentucky River Coal Corporation* (ibid p. 69):

> "The mailing of this letter of acceptance is relied on as completing a contract for a lease. It is urged, with much support from the record, that this letter was not in fact mailed. The District Judge has found that it was mailed, and also that it was never received by appellee."

The court held that although the offer had been mailed it had never been received by the offeree and that consequently the acceptance was not effective.

Moreover, the quotation from the case which the Government sets forth on page 12 of its answering brief, when read in the light of the facts of the case, does not lend any support to the Government's contention. In the Elkhorn-Hazard Coal Company case, Mr. Cockburn, the general manager of the latter company, called on the president of the Kentucky River Coal Corporation concerning a proposed lease. As a result of this interview, the communication quoted in part on pages 11 and 12 of the Government's brief was handed personally to the representative of the Elkhorn-Hazard Company.

In the words of the court:

> "At this interview it was represented by Cockburn that he was on his way to attend a meeting of the directors of his company in West Virginia, and that he wished to know upon what terms a lease could be had of the Williams land. The writing was given to him, so that he might lay the same before the board for their consideration. Nothing was said as to the manner in which Mr. Cockburn might transmit the decision of the board. Several days later, Dudley saw him in Lexington, but nothing was said upon the subject. Appellee next heard of the matter in the following December."

It is clear from the facts in this case that the negotiations, referred to above, were of a preliminary nature only. More

important, since the court found that there had been no acceptance of the offer, there could not under any circumstances be a binding contract.

The argument of the appellee on pages 15 and 16 of the answering brief to the effect that even if there were a contract to lease, it was silent as to so many material terms that it could not be specifically enforced is without merit. The rule is well established that where there is no specification in a contract to execute a lease covering the usual and ordinary covenants and provisions, these will be implied by the courts of equity. *Bennett vs. Moon,* 194 N.W. 802, 1923, and authorities cited therein.

It is a matter of record that not only had the Honolulu Plantation Company been a tenant of the Damon Estate for a long period of time but also it had under lease from the Estate numerous parcels of land, even at the time of the takings involved in these proceedings. The minor details, which were not expressly mentioned in the communications in the instant case, could be readily ascertained and determined by reference to the past conduct of the parties. That the Government is attempting to attach undue importance to this aspect of the case is made obvious by the inconsequential nature of the terms referred to by appellee on page 13 of its brief. If the letter of October 18, 1940 had been intended for purposes of negotiation only, it is not reasonable to believe that the Trustees would have included in the communication the several technical terms therein set forth. Nor is the use of the words "willing to lease" indicative of an intent to enter into negotiations to lease only. Under the circumstances involved here, the use of such a phrase appears to convey the intent on an offer to lease as effectively as any other words which might have been chosen.

The record shows that the Honolulu Plantation Com-

pany continued in possession without objection after the expiration of the 1927 lease. It shows further that the Company, in reliance upon its agreement with the Trustees, made substantial expenditures upon the Damon lands. (R. p. 1202). As has been indicated above, new rentals were billed and paid at the rate set forth in the correspondence (R. p. 1202).

As has been pointed out before Mr. P. E. Spalding testified that he believed that the Honolulu Plantation Company had a lease on the Damon lands in question by virtue of the exchange of letters referred to above. (R. p. 1113 et seq.). In view of these factors, it is submitted to the Court that it was the intention of the parties that the agreement was to constitute at least a contract to lease the premises in question.

Nor is there any merit in the argument of the appellee on pages 14 and 15 of its answering brief where it is contended that there was not an unqualified acceptance of the offer made by the Trustees in their letter of October 18, 1940. It is conceded that the Trustees in the letter of October 18, 1940 did not include fields 95 and 96 in the lands offered to be leased to Honolulu Plantation Company. In the reply of the Honolulu Plantation Company, dated October 21, 1940, the following statement is made: "The terms of your offer are acceptable to Honolulu Plantation Company. We understand that unless fields 95 and 96, makai of Kamehameha Highway, are taken over by some Federal authority before the expiration of the current lease, they will be included in the lands to be leased to Honolulu Plantation Company." Clearly, there was an unconditional acceptance of the offer to lease made by the Trustees. The remark concerning fields 95 and 96 merely indicated a willingness to lease those parcels in the event they were not taken over by the Federal authorities. Thus, there was no qualification or modification of the Trustees' offer.

Even if such remark were to be construed as a request or suggestion that a modification in the terms of the offer be made, it still would not prevent the two letters from constituting an offer and an acceptance.

Frequently, one to whom an offer is made, while making a positive acceptance of the offer, may make a request or suggest that some modification be made. As long as it is clear that the acceptance of the offer is unequivocal, even though the request or modification may or may not be granted, it is clear that a contract is formed. *1 Williston on Contracts,* Para. 79 and cases cited.

Accordingly, in the instant case the statement in the communication of C. Brewer & Company that "We understand that unless fields 95 and 96, makai of Kamehameha Highway, are taken over by some Federal authority before the expiration of the current lease, they will be included in the lands to be leased to Honolulu Plantation Company," (R. p. 1515-1516), has no effect on the validity of the acceptance of the offer made by the Trustees of the Damon Estate. Clearly, it was the intent of the parties that all lands in cane mauka of Kamehameha Highway and makai of the Highway fields 92 to 94, inclusive, were to be included in the lease or agreement to lease.

The appellant directs the Court's attention to a case recently decided by the Court of Claims, *Johnson v. United States,* 79 Fed. Supp. 208, 1948, which involved the claim of a United States District Judge for pay for the remainder of his life in consideration of his resignation.

The court remarked:

> ". . . This Amendment (the fifth) prohibits the taking of private property for public use without just compensation. A contractual right comes within its protection. Monongahela Navigation Co. vs. United States, 148 U.S. 312, 13 S.Ct. 622, 37 L. Ed. 463. The right there taken by the National Government was a fran-

chise granted by a State to a company for the erection of locks and dams. It was held it could not be taken without just compensation.

"The right acquired by a judge who resigned after the passage of the Act, sued on is no less a property right than the franchise granted to such company. Both, it would seem, come within the protection of the 5th Amendment. See also Omnia Commercial Co. vs. United States, 261 U.S. 502, 43 S.Ct. 437, 67 L. Ed. 773."

It is submitted that the Johnson case, supra, is a further illustration of the principle adopted by the courts that where a claimant has been damaged by the taking of a contract right, he is entitled to compensation. If the right of a judge to compensation for a contract right is compensable under the 5th Amendment, certainly the contract right of a claimant whose claim is related directly to land taken in an eminent domain proceeding is also entitled to compensation. As has been pointed out in appellants' opening brief (p. 12-23), the modern concept of property rights, as enunciated in the cases cited therein, requires the payment of just compensation where contract rights are taken in an eminent domain proceeding. At the time of the takings in the present case, the Honolulu Plantation Company was in possession of the premises under at least a valid contract to lease. The Company was paying rentals in accordance with the terms of the agreement. It had made substantial expenditures on its plant as a whole and on the Damon lands in particular in reliance on the validity of the lease. The takings by the Government in this proceeding results in the expropriation of that contract to lease. Under the authorities referred to on Pages 13-23 of appellants' brief, the Honolulu Plantation Company as the owner of a contract right directly related to the lands taken is entitled to compensation therefor.

II.

APPELLANT IS ENTITLED TO AN AWARD OF $595,010 AS SEVERANCE DAMAGES FOR THE TAKING OF ITS PROPERTY INTEREST IN 595.01 ACRES OF CANE LAND HELD BY IT UNDER THOSE CERTAIN AGREEMENTS EXECUTED BY AND BETWEEN THE TRUSTEES OF THE DAMON ESTATE AND SAID COMPANY.

On page 17 of its answering brief, the appellee argues that since the trial court rejected the uniform figure of $1,000 per acre taken advanced by appellant as to the 595.01 acres held under the Damon title, appellant is not entitled to relief because if failed to properly prove any other measure of damages for the taking of the said 595.01 acres.

The answer to this contention is found in the testimony of a number of the Company's witnesses, the summary of which testimony is set forth on pages 32-36, inclusive, of appellant's opening brief. The evidence offered by the Company's witnesses showed that the severance damages amounted to $1,000 per acre for each acre of cane land taken for the entire 1087.59 acres taken in these proceedings. All of the Company's witnesses testified that in arriving at the figure of $1,000 per acre, they considered all of the leases of the Company, including the lease on the Damon lands.

The District Court in its decision awarded severance damages to the Honolulu Plantation Company upon the basis of $1,000 per acre for 440.175 acres, or a total of $440,175. The Court denied severance damages in connection with the taking of the 595.01 acres of land held under the Damon title on the theory that the Company did not have an estate or interest in those lands which would entitle it to compensation in these proceedings.

In view of the fact that the Government did not present any evidence on the issue of severance damages, the testimony of the Company's witnesses that the value of the remaining physical property depreciated at the rate of $1,000 per acre for each acre of cane land taken in these proceedings should be accepted by this Court as the proper measure of severance damages in this proceeding.

CONCLUSION

Accordingly, it is submitted to the Court that the Honolulu Plantation Company by virtue of its estate and interest in the Damon lands is entitled on this cross-appeal to judgment in the amount of $595,010, in addition to the amount of $494,748 awarded by the lower court.

Dated at Honolulu, T. H., this 16th day of May, 1949.

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